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[illegible] TERM, 1996

[illegible] KLEHR,

Petitioners,

v.

A.O. SMITH CORPORATION AND
A.O. SMITH HARVESTORE PRODUCTS, INC.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

**AMICUS CURIAE BRIEF OF
THE NATIONAL ASSOCIATION OF MANUFACTURERS
IN SUPPORT OF THE RESPONDENTS**

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The National Association of Manufacturers ("NAM") respectfully submits this *amicus curiae* brief in support of respondents A.O. Smith Corporation and A.O. Smith Harvestore Products, Inc.[1]

INTEREST OF *AMICUS CURIAE*

The NAM is the nation's oldest and largest broad-based industrial trade association. It has more than 14,000 member companies and subsidiaries, including approximately 10,000 small manufacturers. These firms are located in every state, produce about 85 percent of U.S. manufactured goods, and employ more than 18 million persons. Through its member companies and affiliated associations, the NAM represents every industrial sector.

The NAM's members are legitimate businesses, who often find themselves accused of "racketeering" conduct in treble-damage civil suits brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. These claims typically involve "garden-variety" commercial disputes, involving matters such as false-advertising claims or contract disputes.

SUMMARY OF THE ARGUMENT

In determining when civil RICO claims accrue, for statute of limitations purposes, the Court should adopt a rule which (1) protects defendants against stale claims and (2) provides definite repose from past, contingent liabilities. Those goals were stressed by the Court in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), in adopting a

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[1]Counsel for both the Petitioners and the Respondents have consented to the filing of this brief. Their consents are on file with the Clerk.

four-year limitations period for civil RICO claims, and should likewise guide selection of the proper limitations-accrual rule.

The "last predicate act" accrual rule urged by petitioners should be rejected because it would allow recoveries on stale claims and would frustrate the goal of repose. That rule, if adopted, would permit claims to be brought seeking recoveries for readily-apparent injuries incurred decades earlier, as long as a single predicate act occurred in the four years prior to the filing of the civil RICO suit. Actions asserting such hoary RICO claims pose the risk of crippling treble damages despite the severe prejudice to defendants in their ability to marshall exculpatory evidence due to the passage of time, the departure of employees, the inevitable fading of memories, and other factors. The enduring cloud of long-lived RICO liability based on events occurring decades earlier would also create a severe drag on the ability of business to raise capital, borrow money, enter into corporate transactions, and generally run their businesses.

The Court should therefore avoid any accrual rule that operates, in effect, to extend the four-year limitations period for civil RICO claims to span many additional years in those cases where the alleged injuries and legal violations are readily apparent and there have been no affirmative acts of fraudulent concealment.

ARGUMENT

I. THE COURT SHOULD ADOPT AN ACCRUAL RULE THAT PREVENTS STALE CLAIMS AND PERMITS CONTINGENT LIABILITIES TO LIE IN REPOSE

When this Court adopted a uniform statute of limitations for civil RICO claims in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), it was guided by the fundamental principle that it is "'utterly repugnant'" to allow federal suits to be brought "'at any distance of time.'" *Malley-Duff*, 483 U.S. at 156 (quoting from *Wilson v. Garcia*, 471 U.S. 261, 271 (1985)).

This "repugnance" stems from two concerns. As the Court elaborated:

> [1] Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. [2] In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten.

Malley-Duff, 483 U.S. at 156 (quoting from *Wilson v. Garcia*, 471 U.S. at 271). The Court also noted that limitations principles should not apply in such a way that "'[d]efendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.'" *Id.* (quoting from *Wilson v. Garcia*, 471 U.S. at 275 n. 34).

The "last predicate act" accrual rule advanced by petitioners, and the similar rule used at one time by the Third Circuit in *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988), badly fails both principles. Under those rules, a

RICO plaintiff can incur injuries in year 1, continue to incur injuries in years 2 through year 20 which are readily apparent to a reasonably diligent person, and then sue in year 20 for injuries incurred during the *entire* 20 years.

The staggering implications of such a rule are apparent from the present case. To begin, a "garden-variety" false-advertising claim,[2] involving a sale of a silo by a legitimate business to farmers, can easily be pled as a RICO "racketeering" violation although no criminal conviction has occurred and the defendant is a respected business. *See H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989). This demonstrates that any manufacturer in America can be put to the substantial expense of defending RICO claims -- many of which are unfounded and brought to coerce higher settlements -- for the sale of any of its products, and based on as little as any two advertising claims, made to any of the manufacturer's thousands, millions, or even tens of millions of customers.

That exposure is bad enough, but one that manufacturers must presently face as the cost of doing business.[3] However,

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[2] In *Malley-Duff*, the Court noted that civil RICO claims can address "'garden variety' business disputes" including "breach of contract, fraud, conversion, tortious interference with business relations, misappropriation of trade secrets, unfair competition, usury, disparagement, etc." 483 U.S. at 143 (quoting court of appeals opinion).

[3] The Court has construed RICO to apply to legitimate, "respected" businesses that have not been convicted of any predicate criminal offense. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 493, 499 (1985). The Court observed that, "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors." 473 U.S. at 500. There is no cause to adopt an accrual rule that exacerbates this trend when the statute itself is silent on the issue of

(continued...)

the associated number of potential claims, and their magnitude, would be increased vastly under the petitioner's proposed accrual rule. If that rule were adopted, claims could be brought for injuries incurred decades ago if a product is still offered for sale today, even where the plantiff's injuries were at all times readily apparent. No precedent has been cited by petitioners for such a result from any other civil cause of action.[4]

At the same time, the ability of manufacturers effectively to defend such claims would be limited due to the staleness of the evidence. With the passage of time, employees leave, memories fade, ownership of manufacturing firms may change hands one or more times, and exculpatory evidence may be discarded inadvertently or in the ordinary course of business. As a practical matter, most manufacturing firms will lack ready and complete evidence of the multitudinous transactions in which they have been engaged over the course of many years. Potential plaintiffs will be at a marked advantage, since their own accounts of their individual interactions with the defendant will be difficult to impeach with specific evidence.

Petitioners suggest (at 31) that an open-ended accrual rule is appropriate to vindicate the public-interest purpose of civil RICO claims. This contention should be given no weight in view of the Court's ruling in *Shearson/American Express Inc.*

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[3](...continued)
accrual.

[4] While product-liability claims are often permitted to be filed many years after an injury-causing act occurred, that may be permitted because the injury may manifest itself only after a lengthy delay of years or decades. In this case, however, petitioners' "last predicate act" rule would permit claims to be pursued for all damages incurred at any time, even if the injury was readily apparent at all times, so long as a final unlawful act occurs within the final four-year period prior to suit.

v. McMahon, 482 U.S. 220, 242 (1987), that "[t]he private attorney general role for the typical RICO plaintiff is simply less plausible than it is for the typical antitrust plaintiff." The Court further explained that the "policing function" of the RICO damages remedy "was a secondary concern." 482 U.S. at 240-41. Accordingly, petitioners cannot justifiably cloak their plea for an open-ended accrual rule in "public interest" garments.

Likewise, the Court should not adopt a virtually boundless accrual rule by dint of Congress' direction that RICO's provisions be "liberally construed," because the Court has noted that this was "not an invitation to apply RICO to new purposes that Congress never intended." *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). The Court has determined in *Malley-Duff* that the policies favoring repose, and avoidance of stale claims, apply to civil RICO claims. The accrual rule adopted by the Court should not serve to frustrate those policies.

In short, an open-ended accrual rule for civil RICO claims would be a disaster for American business. Some of the adverse affects are described further below.

II. A BOUNDLESS ACCRUAL RULE WILL IMPOSE SUBSTANTIAL ECONOMIC COSTS ON AMERICAN BUSINESSES

The burdens presented by an open-ended RICO accrual rule will not fall infrequently or on isolated occasions, because civil RICO claims are filed by the hundreds each year. The Administrative Office of the United States Courts reported that 849 civil RICO cases were filed in the federal district courts in the 12-month period ending September 30, 1996, and 900 were filed in the prior year. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *SUPPLEMENTAL TABLES*, Table C-2 (1996). Apart from their sheer numbers, civil RICO claims are brought against all sorts of businesses, and are rooted in "garden-variety" disputes involving matters as diverse as false advertising (such as this case), insurance disputes, and contract disputes. *See* note 2, *supra*. Increasingly novel applications are being urged for civil RICO claims, extending even into the realm of sexual harassment.[5] As this Court held in *National Organization of Women, Inc. v. Schleider*, 510 U.S. 249, 259 (1994), an entity can be subject to civil RICO liability even if it does not engage in unlawful activity for an "economic motive."

The economic costs associated with the defense of stale claims, and uncertain contingent liabilities for prior periods, are borne by manufacturers and other firms across the nation. Enormous direct and indirect costs would be imposed on American businesses by petitioners' proposed accrual rule, which would permit recoveries for RICO violations going back 19 years in this case, and potentially longer in others.

For example, businesses that seek to purchase insurance in order to protect themselves against crushing RICO liabilities would find it difficult and more costly to obtain such insurance against the greater number and magnitude of claims that could result from the longer period of liability exposure. Insurers have "reacted sharply to the disappearance of litigation time limits" by shifting from "occurrence" to "claims-made" policies, and ceasing to write coverage at all when "[p]ricing a policy to cover the risk intelligently [is] impossible." Peter W. Huber, LIABILITY: THE LEGAL REVOLUTION AND ITS

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[5] *See* William H. Kaiser, *Extortion in the Workplace: Using Civil RICO to Combat Sexual Harassment in Employment*, 61 BROOKLYN L. REV. 965 (Fall 1995).

CONSEQUENCES 139 (1988). The cost of insurance, when available, is necessarily increased by the greater period of potential risk. *Id.* at 141. If insurance is not available, prudent firms must instead take reserves against potential claims. In either case, funds that could be used in productive enterprises -- to create jobs, invest in capital equipment, or in entrepreneurial ventures -- are diverted to higher insurance premiums or to unproductive liability reserves.

Businesses facing possible civil RICO suits from stale claims may also be limited in their ability to raise capital, or borrow money, in public or private markets. Investors and lenders will avoid businesses that face false-advertising or other similar claims if the exposure for past damages is unlimited in time. These effects can be substantial, as evidenced by the difficulties that the Superfund law[6] has created in capital-formation and borrowing for firms that face potential liabilities for industrial pollution occurring thirty, forty, or more years ago. One leading bond-rating agency has concluded that the exposure of entire industries to environmental liabilities dating back decades affects those industries' overall credit risk and may pose concerns about "corporate solvency." [7] The same problems may also impair corporate combinations or mergers with firms that have potential RICO exposure dating back decades, even though such combinations or mergers may otherwise offer benefits to shareholders or the public generally

[6] The Superfund law is more formally known as the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675.

[7] "Moody's believes that environmental liabilities may pose significant credit risks because of their potential for creating sudden and possibly large financial obligations on past generators of waste materials." Moody's Special Comment, *Environmental Risks and Corporate Credit Quality* (April 1991).

through synergies or other means. This experience may parallel that in the environmental field, where one study reported that "91% of firms surveyed evaluate the environmental performance of potential [acquisition] partners." The Center for Environmental Management, Tufts University, MULTINATIONAL CORPORATIONS AND THE ENVIRONMENT: A SURVEY OF GLOBAL PRACTICES, at 9 (April 1991).

Potential business defendants facing the risk of stale claims will also incur greater records retention expenses, because it will be prudent for businesses to retain records for longer periods. For example, this case illustrates the potential need for the manufacturer of a product to retain records of its dealings with each and every customer for twenty years or more. It is well recognized by corporate records managers that "[t]he various statutes of limitations are part of the legal framework on which a good records policy is structured." 1 William A. Hancock (ed.), GUIDE TO RECORDS RETENTION 109 (1995). These requirements "are imposing an *increasing burden on business to maintain records for extremely long periods of time*." *Id.* at 103 (emphasis in original). The cost of doing so could be staggering for large manufacturing firms, which sell products by the millions, or even tens of millions, to the general public. Indeed, because employees often move from one employer to another with some frequency, firms that prudently anticipate potentially stale claims would need to incur the expense of routinely obtaining written statements from departing employees about numerous subjects, or alternatively track their whereabouts.

None of these costs are inevitable, or unavoidable, if the accrual rule adopted by this Court sets reasonable bounds on the temporal scope of civil RICO liability. The Court should not allow "real or imagined malefactors [to be] chased eternally down the corridors of time." Huber, LIABILITY, *supra*, at 97.

Instead, the Court should adopt a rule that allows "ancient controversies to rest in peace so that once-fresh wounds would have a chance to heal." *Id.*

CONCLUSION

For the foregoing reasons, the Court should reject the accrual rule proposed by petitioners and affirm the judgment below.

Respectfully submitted,

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Dated: March 21, 1997